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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1095

JERRY J. ACUFF, GARNER E. ALLEN, GEORGE J. BULLOCK, CORBETTE W. CARLISLE, C. L. CARTER, DONALD W. CARTER, GEORGE W. DEAN, DEWEY R. FAIRCLOTH, M. T. FRAZIER, A. J. GIDDENS, BOBBY HARVISON, CHARLES W. HAYS, JIMMY D. HESTER, MIKE KITTRELL, T. W. KITTRELL, PHILLIP LEE, ROBERT S. MCCOY, HERBERT RAY MEITZLER, D. W. NARAMORE, WILLIAM I. PLATT, A. C. PUGH, JR., JAMES W. RICHARDSON, L. T. ROBBINS, J. I. RUSSELL, CHARLES W. SCHULER, B. R. SINGLETARY, R. C. SKIDMORE, DONALD L. WARD, J. D. WHITMAN, BOBBY N. WHITTEN, WILLIAM A. WINTERS, *Petitioners,*

v.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO; and SCOTT PAPER COMPANY, SOUTHERN DIVISION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO, IN OPPOSITION TO ISSUANCE OF THE WRIT

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OPINION BELOW

The Opinion of the Court of Appeals (Pet. App. 1a-5a) is reported at 404 F. 2d 169 (1968). The District Court did not render an opinion.

JURISDICTION

The decree of the Court of Appeals was entered on November 27, 1968 (Pet. App. 1a). The Petition for a Writ of Certiorari was filed on February 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

May individual employees obtain judicial review of a partially adverse arbitration award on grounds they were not permitted independent counsel at the arbitration hearing when their collective bargaining representative's counsel represented them and all other employees in the bargaining unit pursuant to a collective bargaining agreement making the decision of the arbitration "final and binding"?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et. seq.) as set forth in the appendix to the petition (p. 7a).

STATEMENT

Scott Paper Company, Southern Division (the company) and United Papermakers and Paperworkers, International Brotherhood of Pulp, Sulphite and Papermill Workers and International Brotherhood of Electrical Workers (the unions) have been parties to collective bargaining agreements since 1941 (R. 18-19).

The current contract provided that the company "agrees to and hereby does recognize the unions as exclusive representative of all production and main-

tenance employees . . . for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." (R. 22). This agreement, which prohibited strikes and lockouts, provided for arbitration of "any dispute or complaint" pursuant to the request of the company or the unions, and further provided that "the decision of the arbitrator shall be final and binding on all parties" (R. 6).

In November 1966 when the agreement was in full force and effect an unauthorized work stoppage occurred (R. 7, 23-37). During the course of this unauthorized work stoppage, the company discharged 63 employees who were members of the bargaining unit (R. 7, 10-11, 26-27). All other employees returned to work at the conclusion of the unauthorized work stoppage and the unions promptly filed grievances with the company on behalf of the 63 discharged employees. (R. 8). The company at first refused to submit the grievances to arbitration (R. 8, 11-13).

The unions, on January 31, 1967, brought an action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 to compel arbitration of the 63 discharges (R. 1). Subsequently, the company entered into a stipulation with the unions to arbitrate and the District Court on May 17, 1967 ordered the parties to proceed to arbitration, but retained jurisdiction over the case.

At the hearing, the arbitrator denied the discharged employees' oral and written motions "for individual and special counsel to represent" them and the unions' counsel represented all of the employees before the arbitrator (R. 19-20).

On August 17, 1967, the arbitrator denied the grievances of 16 of the discharged employees because of their conduct in connection with the illegal strike. The remaining 46 employees were reinstated but without back pay (R. 59-60).

On November 14, 1967, the 16 employees whose discharge had been sustained by the arbitrator moved to intervene in the District Court action. Subsequently 17 employees who had been reinstated without back pay also moved to intervene (R. 18, 60). The motions for intervention sought, *inter alia,* to vacate the arbitration award (R. 62). The petitioners did not allege that the unions had breached their duty of fair representation or that the unions were guilty of fraud, misrepresentation, bad faith, dishonesty of purpose, or such gross mistakes or inaction as to imply bad faith on the part of the unions. The District Court denied the motions to intervene on January 31, 1968 without decision (R. 63).

In dismissing the subsequent appeal, the Court of Appeals concluded that the discharged employees, whose grievances were denied entirely or in part by the arbitrator, do not have the right to intervene in an action brought by their collective bargaining agent pursuant to the contract between the unions and the company. (Pet. App. 3a). After noting that the petitioners had made no allegation of bad faith on the part of the unions, the court below stated that the unions had pursued the grievances "with energy and, in large measure, with success." Since the collective bargaining agreement provided that only the unions and the company "have the right to demand arbitration," the lower court concluded that only these

two parties have the right to conduct the arbitration as well. Accordingly, the Court of Appeals dismissed the motion to intervene and to vacate the arbitrator's award (Pet. App. 5a).

ARGUMENT

1. Petitioners claim that their rights of due process were violated when the arbitrator refused to permit them to be represented at the arbitration hearing by independent counsel. They were represented, as were all of the employees, by counsel chosen by their collective bargaining agent. The unions were the exclusive representative of Acuff and his co-workers by virtue of § 9(a) of the National Labor Relations Act. The agreement between the company and the unions establishing the grievance and arbitration procedure itself resulted from their respective obligations under the Act "to promote industrial stabilization through the collective bargaining agreement." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). Accordingly, the Court of Appeals held that since the individual employees could not compel arbitration under the contract, they could not intervene merely because the unions were not completely successful. (Pet. App. 3a-4a).

This Court has long held that if the collective bargaining machinery is to work, unions must be free "to sift wholly frivolous grievances which would only clog the grievance process" and "to take a position on the not so frivolous disputes." *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964). Thus, while the unions are "charged with the responsibility of representing [all employees] fairly and impartially" (*Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 255

(1945)) they nevertheless, of necessity, must have "discretion to make such concessions and accept such advantages as, in the light of all relevant considerations [they] believe will best serve the interests of the parties represented" (*Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337-338 (1953)). The cardinal consideration, then, is that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the union he represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. *Ibid.,* at 338.

In this regard, the Court of Appeals cited *Vaca* v. *Sipes,* 386 U.S. 171 (1967) wherein this Court stated at p. 191:

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation."

In *Local Union Number 742, United Brotherhood of Carpenters and Joiners of America* v. *NLRB,* 377 F. 2d 929 (C.A. D.C. 1967) *cert. denied,* 389 U.S. 843 (1967) the Court rejected the local's contention that it was deprived of a full and fair hearing before the Board because the trial examiner failed to apprise the business agent of the probable need for counsel. The court held that there was no denial of the right to counsel, rather a choice of the local to be represented by its business agent. In the instant case, the lower court pointed out that the individual employees had

agreed to be represented by their collective bargaining agent and they can't equate "lack of complete success with bad faith anymore than they could if their own lawyers had been involved." (Pet. App. p. 4a).

2. Nor is there substance to petitioners' contentions (Pet. App. 5-93) that their asserted reasons for granting certiorari are responsive to the questions they deem raised. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, U.S. 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968), deals with the obligations of an arbitrator to disclose to the parties to a commercial dispute any business dealings on his part which might create an impression of possible bias. There is no contention here that the impartial arbitrator selected by the parties to the labor dispute was biased. The "other side of the coin" in *United Mine Workers* v. *Illinois State Bar Association,* 389 U.S. 217 (1967) and *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1964) would be turned up if the unions, having provided counsel for their members' use in personal and private litigation, were to insist that they utilize such counsel, and none other, in their personal and private litigation. That is not this case.

3. This Court has dealt at length with the finality to be accorded arbitration awards which have been reached pursuant to collective bargaining contract provisions which make such arbitration "final and binding" upon the parties to the award: it is final and binding upon the parties, just as the contract says it is. *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss and Company,* 372 U.S. 517 (1963).

The contract is equally binding on employees. For example, it is settled that a discharged employee may

not maintain an action against an employer under Section 301 to contest his discharge after an arbitrator's adverse decision under a contract making that decision "final and binding." *Miller* v. *Spector Freight Systems,* 366 F. 2d (1st Cir. 1966). See also *Pulp, Sulphite and Papermill Workers, Local 874* v. *St. Regis Paper Co.,* 362 F. 2d 711 (5th Cir. 1966). In this instant case, similarly, the contract provided that the decision of the arbitrator was "final and binding." (R. 6).

Moreover, there is no need to consider whether such cases as *Vaca* v. *Sipes,* 386 U.S. 171 (1967) open rights to employees which are not open to courts to reweigh the merits of a grievance. (Pet. App. 9-11). *Cf. United Steelworkers of America* v. *American Manufacturing Co.,* 363 U.S. 564, 567-568 (1960).

Although grievants are not foreclosed from seeking further relief from the National Labor Relations Board, the Board will defer to an arbitrator's award "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes of the Act." *International Harvester Co., Indianapolis Works,* 138 NLRB 923, 927[1], *affirmed, Thomas D. Ramsey* v. *N.L.R.B.,* 327 F. 2d 784 (7th Cir. 1964), *cert. denied,* 377 U.S. 1003 (1964). In that case the Board deferred to an arbitrator's award based on a hearing of which the affected employee and petitioner had had no notice and had not appeared because "Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of griev-

[1] Cited with approval in *Carey* v. *Westinghouse Electric Corp.,* 379 U.S. 261 (1963).

ance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of [the Act's] statutory objective." In affirming, the Court found that "there is no statutory or constitutional right of an employee to be present at an arbitration hearing." 327 F. 2d at 787.

4. The allegation that the representation was inadequate is supported solely by the fact that the representation was not by counsel chosen by the individuals affected by the proceeding. Under the circumstances, this fails to establish manifest error by the lower Court. Nor does the fact that the representative only partially secured the relief sought establish inadequate representation (Pet. App. 4a).

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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